UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

STAY THE COURSE WEST VIRGINIA, a West Virginia unaffiliated independent expenditure political action committee; **DAVID BAILEY**, in his capacity as Chairman and Treasurer of Stay the Course West Virginia; **PINEVILLE LUMBER, INC.,** a West Virginia Corporation; and **THOMAS STEPHEN BAILEY,**

Plaintiffs,

v. **Civil Action No. 1:12-cv-01658**

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State and member of the West Virginia State Election Commission; and **SCOTT ASH,** in his official capacity as the Prosecuting Attorney for Mercer County, West Virginia, as a representative of the class of all West Virginia Prosecuting Attorneys,

Defendants.

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs, by counsel and pursuant to Rule 23 of the Federal Rules of Civil Procedure, have moved for the certification of a class in this matter consisting of all 55 prosecuting attorneys for West Virginia. This Memorandum is submitted in support of Plaintiffs' Motion.

I. THE REQUIREMENTS FOR CLASS CERTIFICATION UNDER RULE 23.

Rule 23 of the Federal Rules of Civil Procedure must be satisfied in order to maintain a class action. Rule 23 sets forth the following prerequisites for a class action:

> (a) A class may be maintained only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class.
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> (b) In addition to the prerequisites of paragraph (a),
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for the party opposing the class; or
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> (B) adjudications with respect to individual members of the class that, as a practical matter, would be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests;
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> (2) the party opposing the class has acted or refused to act on rounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include: (A) the

> interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

Each of these requirements is discussed below.

II. CLASS CERTIFICATION IS APPROPRIATE IN THIS CIVIL ACTION.

A. A Defendant class of prosecuting attorneys satisfies the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure.

1. The class is so numerous that joinder of all members is impracticable.

It is possible to join all West Virginia prosecuting attorneys in this civil action, but to do so would be impracticable and unnecessary, and would be inconsistent with the interest of judicial economy. Joinder of all 55 prosecuting attorneys would needlessly complicate and slow the resolution of this litigation by resulting in 55 answers to the Complaint, 55 responses to this Memorandum, 55 appearances at hearings, et cetera, with most if not all answers and memoranda stating essentially the same responses and arguments because the interests of all prosecuting attorneys are the same, as demonstrated by the following discussion.

2. There are questions of law and fact common to all members of the class.

All prosecuting attorneys have the same job description: To support the Constitution of the United States and the West Virginia Constitution, and to faithfully discharge the duties of their office, W. Va. Const. art. IV, § 5; and, *inter alia*, to attend to the criminal business of the State in their county and prosecute all necessary and proper proceedings against offenders of the penal law, W. Va. Code § 7-4-1 (2010). Because this matter involves a facial challenge to certain election law provisions and policies, the relevant facts and law would be the same in every case presenting the same constitutional issues. Hence, all prosecuting attorneys would necessarily face the same questions of law and fact in order to resolve the question presented in this case: Whether the West Virginia election law provisions and policies at issue should be enforced against the Plaintiffs and others similarly situated.

3. The claims or defenses of the representative party are typical of the claims or defenses of the class.

As noted in the previous section A.2, all prosecuting attorneys take the same oath of office and have the same legal authority. They are identically situated as to the claims presented by Plaintiffs in this civil action and their responsibilities are the same. No member of the class is differently situated in any legally relevant sense from their fellow members for purposes of the injunctive and declaratory relief sought by Plaintiffs. In addition, as this is a facial challenge, there would be no factual or legal differences as to enforcement actions taken against individuals or organizations different than the Plaintiffs.

4. The representative party will fairly and adequately protect the interests of the class.

Due process is satisfied in a class action if the absent members' interests are adequately represented by the class member(s) who are present. *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). Adequate representation "depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (quotation omitted).

In this case, the Defendant class will be adequately represented by Prosecuting Attorney Scott Ash. Mr. Ash is an experienced attorney who has attained the distinction of serving as the Prosecuting Attorney for Mercer County for several years. As such he has experience and expertise in defending and enforcing the laws of the State of West Virginia. Furthermore, Mr. Ash's office has experience as a class representative in legal actions challenging provisions of the West Virginia Election Code. *See Center for Individual Freedom, Inc. v. Tennant,* 2011 WL 2912735, Nos. 1:08-cv-190 & 1:08-cv-1133, n.8 (S.D.W.Va. July 18, 2011) (Mr. Ash was substituted as the class representative as the successor of former Mercer County Prosecutor Timothy Boggess.); *Appalachian Power Co. v. Sadler,* 314 F. Supp. 639, 640 (S.D.W.Va. 2004); *West Virginians for Life v. Smith*, 960 F. Supp. 1036, 1042 (S.D.W.Va. 1996). In addition, Mr. Ash will be assisted by counsel for the West Virginia Secretary of State, so there is no question about his ability to fairly and adequately protect the interests of his fellow prosecuting attorneys. Finally, there is an absence of antagonism between the members of the class, its representative, and attorneys; there is a clear sharing of interests between the representative and the absent class members; and there is no collusion between the Plaintiffs and Defendants.

B. A Defendant class of prosecuting attorneys meets the prerequisites of Rule 23(b) of the Federal Rules of Civil Procedure.

1. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class.

The West Virginia election law provisions and policies in question are subject to challenge on federal constitutional grounds within the jurisdiction of each prosecuting attorney in West Virginia. There is a significant possibility of criminal prosecution against one or more of the Plaintiffs in any West Virginia county in the event a Plaintiff exercises their right to free speech and solicits, makes, or accepts a contribution prohibited by the challenged provisions and policies or, perhaps, spends money received in contravention of a challenged provision or policy. In such a case, the same constitutional claims raised herein would be raised as a defense to prosecution. This would create the risk of inconsistent and varying adjudications regarding the constitutionality of the challenged provisions and policies.

Plaintiffs believe that the law is clear and the authority strong in support of the constitutional challenges stated in Plaintiffs' Complaint and, therefore, a challenge asserted in any jurisdiction would eventually result in the relief sought by Plaintiffs, and so it is prudent and serves the best interest of judicial economy to address the issues stated in the Complaint in one action, namely this lawsuit now filed in this Court, with a class comprised of all West Virginia prosecuting attorneys represented by Defendant Ash.

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Plaintiffs do not know of any party that does oppose or may oppose the class, and do not anticipate opposition as there was no opposition to class certification and appointment of the Mercer County Prosecuting Attorney in prior legal actions challenging portions of the West Virginia Election Code. (*See infra.* at 5 for citations to cases where the Mercer County Prosecuting Attorney, including Defendant Ash, have been appointed as the class representative.) Plaintiffs believe that prosecuting attorneys as a general rule fulfill their legal duty to attend to the criminal business of the State in their county and prosecute all necessary and proper proceedings against offenders of the penal law. As a result, they may be expected to prosecute known violations of the challenged provisions and policies. Therefore, it is fair to say that the members of the class of prosecuting attorneys act "on grounds generally applicable to the class."

3. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members.

As has been discussed above in Sections A.2, A.3, and B.1, the issue common to the Defendant class of prosecuting attorneys is whether the election law provisions and policies at issue are unconstitutional on their face. Because this is a facial challenge to be decided on the law and undisputed facts set forth in the Complaint, and this matter is focused upon the rights of similarly situated entities, the common questions of law and basic fact that every West Virginia prosecuting attorney would face if presented with a similar case clearly predominate over any questions affecting only individual members.

4. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The matters pertinent to finding whether a class action is superior to other available methods for the fair and efficient adjudication of this controversy include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

As to requirement A, individual prosecuting attorneys have no special interest in individually controlling the defense of separate actions. As set forth in the preceding paragraphs, the law and basic facts presented in this case, which would form the basis of any challenge to the provisions and policies at issue, are not unique to this action. The same or similar facts and the same law would necessarily form the basis of any constitutional challenge to the provisions and policies challenged in the Complaint. There is no reason that a different forum than this forum, and a different class representative should be favored over this forum and Defendant Ash. As noted previously, challenges to other provisions of the West Virginia Election Code have been litigated in this Court with the Mercer County Prosecuting Attorney as the class representative. There is nothing materially different about the instant case that would favor another forum or a different class representative so as give another prosecuting attorney a special interest in individually controlling the defense of separate actions.

As to requirement B, Plaintiffs are not aware of any similar litigation concerning the controversy presented herein that is already commenced by or against any members of the proposed class of prosecuting attorneys.

As to requirement C, this forum is most suitable for these claims because the legal issues raised are based on the Constitution of the United States, the issues are raised under color of state law, and similar challenges to other portions of the West Virginia Election Code have been considered and decided by this Court.

And, as to requirement D, for the reasons set forth addressing each Section A.1 through A.4 and B.1 through B.3, the difficulties likely to be encountered in the management of this case are minimal and are far less than the difficulties of separate legal actions with the risk of varying time frames for resolution of the issues presented and the possibility of inconsistent outcomes, especially if various actions are heard in different state courts.

WHEREFORE, for the reasons stated above, Plaintiffs respectfully request that this Court, pursuant to Rule 23(c)(1)(a) and at an early practicable time, because time is of the essence, order that this civil action shall be certified as a class action for the class of all prosecuting attorneys for the State of West Virginia with Defendant Scott Ash as the class representative.

Date: May 23, 2012

STAY THE COURSE WEST VIRGINIA, DAVID BAILEY, **PINEVILLE LUMBER, INC.,** and **THOMAS STEPHEN BAILEY,**

By Counsel

/s/ W. Bradley Sorrells

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